

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 MAY 15 AM 11:19

BY RONALD R. CARPENTER

CLERK *h*

No. 81714-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

KENT DUCOTE,

Petitioner,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL &  
HEALTH SERVICES,

Respondents.

---

PETITIONER'S ANSWER TO AMICUS BRIEF OF  
THE WASHINGTON ASSOCIATION OF SHERIFFS  
AND POLICE CHIEFS

---

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

HIGGINSON LAW OFFICES

By: Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

By: Carla J. Higginson  
WSBA No. 10653

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

175 Second Street North  
Friday Harbor WA 98250  
(360) 378-2185

Attorneys for Petitioner

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

## TABLE OF CONTENTS

A.	This Court Should Reject Amicus' Invitation To Overrule <i>Tyner v. DSHS</i> , A Position That Neither Party Has Advocated.....	1
1.	Whether A "Hierarchy Of Duties" Exists To "Trump" The State's Duty To All Family Members In Investigating Child Abuse Allegations Is Not An Issue Before This Court.....	1
2.	Amicus' Advocacy Of A "Hierarchy Of Duties" Creates A False Distinction. It Is The Familial Relationship That Is Privileged, And The State's Duty To The Family Protects The Child.....	4
3.	Step-Parents Acting <i>In Loco Parentis</i> Are Treated As Parents, And Are Members Of The Protected Family Unit. ....	6
B.	Amicus' Reliance On The "Cinderella Effect" Substitutes Profiling For Investigation. ....	9
C.	Conclusion.....	11

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Smith v. Organization of Foster Families For Equality and Reform</i> , 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) .....	8
---	---

### STATE CASES

<i>Cummins v. Lewis County</i> , 156 Wn.2d 844, 133 P.3d 458 (2006) .....	1
<i>Harris v. State, Dept. of Labor and Industries</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993) .....	2
<i>Long v. Odell</i> , 60 Wn.2d 151, 372 P.2d 548 (1962) .....	1
<i>M.W. v. DSHS</i> , 149 Wn.2d 589, 70 P.3d 954 (2003) .....	5-6
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005) .....	5
<i>State v. Maule</i> , 35 Wn. App. 287, 667 P.2d 96 (1983) .....	10
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	9
<i>Tyner v. DSHS</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000) .....	1-5
<i>Zellmer v. Zellmer</i> , 164 Wn.2d 147, 188 P.3d 497 (2008) .....	6, 7, 10

### STATUTES

RCW 26.44.050 .....	4
---------------------	---

### OTHER AUTHORITIES

U.S. Census Bureau, <i>America's Families and Living Arrangements of Children: 2008</i> , Table C.9 (2008) .....	8
--	---

Petitioner Kent Ducote submits this answer to the amicus brief filed by the Washington Association of Sheriffs and Police Chiefs ("WASPC").

**A. This Court Should Reject Amicus' Invitation To Overrule *Tyner v. DSHS*, A Position That Neither Party Has Advocated.**

**1. Whether A "Hierarchy Of Duties" Exists To "Trump" The State's Duty To All Family Members In Investigating Child Abuse Allegations Is Not An Issue Before This Court.**

The WASPC brief is not a proper amicus submission, as more than half of the brief is devoted to advocating a reversal of this Court's decision in *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (Amicus Br. 3-5, 9-18), a position neither party has taken in the lower court or in the appellate courts. This Court should reject WASPC's attempt to inject this new issue at this late stage of the case, as it "is well established that appellate courts will not enter into the discussion of points raised only by amici curiae." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962); see *Cummins v. Lewis County*, 156 Wn.2d 844, 850-51, fn. 4, 133 P.3d 458 (2006) ("Under case law from this court, we address only claims made by a petitioner and not those made solely by amici.").

In its amicus brief, WASPC asks this Court to consider "for the first time – the 'hierarchy of duties' that an investigator owes as

between the abused child, and the accused parent, and hold that such duties cannot reasonably exist." (Amicus Br. 9, emphasis in original) WASPC's position is entirely at odds with this Court's decision in ***Tyner***, where this Court held that the State "owes a duty of care to a child's parents, even those suspected of abusing their own children, when investigating allegations of child abuse." 141 Wn.2d at 82. This Court in ***Tyner*** held that in a child abuse investigation, "the State has the duty to act reasonably in relation to all members of the family." 141 Wn.2d at 79. WASPC in its amicus brief urges this Court to overrule ***Tyner*** and to hold instead that the "hierarchy of duties. . . precludes a legal duty from running to a parent accused of abusing their child. That is, no duty exists." (Amicus Br. 11)

This Court should not, at this late stage, accept WASPC's invitation to reconsider its decision in ***Tyner*** when no other party, including the State, has asked it to do so. The limited exception to the rule that a court will not consider an issue raised only by amicus does not apply here because reconsideration of ***Tyner*** is not "necessary to reach a proper decision." ***Harris v. State, Dept. of Labor and Industries***, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993).

This Court need not address the merits of its decision in ***Tyner*** in order to decide the issue presented here.

Here, the question before this Court is “whether a stepparent has standing to sue the Department of Social and Health Services for negligent investigation of a report that the stepparent abused a stepchild.” (Petitioner Supp. Br. 1, *citing* this Court’s website) In other words, does this Court’s holding in ***Tyner*** that the State owes a statutory duty to a child’s parent in investigating child abuse allegations against the parent include step-parents who live in the family home with the child? This Court need not review its holding in ***Tyner*** to resolve that issue. Instead, this Court must determine whether the statutes governing the Department’s investigative duty, which read together protect the integrity of the family unit, provide a cause of action for a step-parent acting *in loco parentis* who has been wrongfully excluded from the family home based on a negligent investigation of abuse.

**2. Amicus' Advocacy Of A "Hierarchy Of Duties" Creates A False Distinction. It Is The Familial Relationship That Is Privileged, And The State's Duty To The Family Protects The Child.**

Should this Court choose to address amicus' newly-raised issue, it should reject WASPC's request to adopt a "hierarchy of duties" under which the State would owe a duty to a parent only if it would not "conflict" with the State's duty to the child because the parent was suspected of abuse. (Amicus Br. 10-11) What WASPC really advocates is elimination of any duty, to either parent or child. This is clear from amicus' conclusion that "[o]ne immediate positive result" of accepting its argument would be that an investigator could always "without fear of liability" seek removal of the child from the family home. (Amicus Br. 12, n.7) Any "hierarchy of duties" proposed by amicus is an illusion.

*Tyner* expressly rejected the argument that the State's "duty does not flow to the child's parents, particularly when the parents are suspected of the abuse." 141 Wn.2d at 77. As this Court recognized in *Tyner*, the "procedural safeguards of RCW 26.44.050 protect both children and family members; children are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children." 141 Wn.2d at 79. This Court noted that in

enacting the statute, “the Legislature has recognized the importance of the family unit and the inextricable link between a parent and child.” **Tyner**, 141 Wn.2d at 79. Accordingly, the State’s duties to both the child and the parent are inextricably linked, and the “State has the duty to act reasonably in relation to *all members of the family*.” **Tyner**, 141 Wn.2d at 79 (emphasis added).

Even if this Court in **Tyner** had not rejected the “hierarchal” analysis proposed by amicus, “ranking” the State’s duties would as a practical matter eliminate any cause of action by a parent for negligent investigation of child abuse. This Court held in **Roberson v. Perez**, 156 Wn.2d 33, 46, ¶ 31, 123 P.3d 844 (2005), that a parent has no claim for negligent investigation of alleged abuse of children with whom the plaintiff has no familial relationship that did not cause a “harmful placement decision” in the plaintiff’s family. If the State’s duty to an allegedly abused child would always “trump” the duty to an accused parent, no cause of action would exist for negligent investigation of alleged abuse of children *within* the family as well; contrary to the duty recognized by the Court in **Roberson** to refrain from “a biased or faulty investigation that leads to a harmful placement decision.” 156 Wn.2d at 45, ¶ 30, *quoting M.W.*



v. *DSHS*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003). Only by recognizing that the duty of reasonable investigation extends equally to all family members can the statutory purpose to avoid unnecessary State interference in the family be fulfilled.

**3. Step-Parents Acting *In Loco Parentis* Are Treated As Parents, And Are Members Of The Protected Family Unit.**

A step-parent acting in a parental role, as much as the biological parent to whom he is married, has a right to raise their children without unreasonable State interference. This Court recently relied upon the right to raise children without undue State interference in affirming the continued relevance of the parental immunity doctrine in tort claims against a step-parent:

[T]he primary objective of the modern parental immunity doctrine is to avoid undue judicial interference with the exercise of parental discipline and parental discretion. . . . Parents have a right to raise their children without undue state interference.

*Zellmer v. Zellmer*, 164 Wn.2d 147, 159, ¶ 24, 188 P.3d 497, 502 (2008). This Court held that the parental immunity doctrine extends to step-parents standing *in loco parentis*, recognizing that there is “no principled distinction between a legal parent and a stepparent who assumes all the obligations and exercises all the responsibilities of parenthood, as the public policy reasons

supporting immunity for a biological or adoptive parent apply equally to one standing in loco parentis. . . :

[S]tep-parents need the same 'wide sphere of discretion as legal parents' when they have assumed the responsibility to discipline and educate a child.

**Zellmer**, 164 Wn.2d at 164-65, ¶ 38.

Likewise here, there is "no principled distinction" between a legal parent and a step-parent in the family home in the State's duty to "act reasonably" in investigation of child abuse allegations against a step-parent who has acted *in loco parentis* to the child. Here, the State treated the petitioner as a parent in its investigation. The State in its motion for summary judgment admitted that petitioner's parental role had already been conceded by the State, and confirmed by Judge Hancock, in the dependency proceedings. See CP 33 (in dependency proceedings, the State argued that "[i]f [the mother] is conceding that parenting to him, he is responsible."), CP 87 (dependency summons served on petitioner stated that "if the Court finds the child dependent, [it] could result in substantial restriction or permanent loss of your parental rights."). The State treated petitioner as a parent in order to remove him from the family home. As a consequence, the State owes petitioner the same duty

it would owe a legal parent to reasonably investigate allegations of abuse of a child in his home.

Excluding step-parents from the protected "family unit" or from being considered a member of the family to which the State owes a duty would also ignore the modern reality of family life. Nearly 4.5 million children in the United States now live with a step-parent. U.S. Census Bureau, *America's Families and Living Arrangements of Children: 2008*, Table C.9 (2008). As the U.S. Supreme Court has recognized, family relationships are not defined solely by "blood," but stem "from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." ***Smith v. Organization of Foster Families For Equality and Reform***, 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). To protect the child, the State owes a duty to protect the relationship between the child and all family members, including step-parents who have undertaken a parental role within the family home.

**B. Amicus' Reliance On The "Cinderella Effect" Substitutes Profiling For Investigation.**

WASPC attempts to draw a line between step-parents and biological parents by invoking the "Cinderella Effect," claiming that because a child is statistically more likely to be abused in a household with a step-parent than a child who lives with both natural parents, there can be no duty to reasonably investigate claims of step-parent abuse. (Amicus Br. 6-7) First, the accuracy of such a claim is at best debatable, especially in light of other statistics provided by WASPC that 80% of alleged perpetrators who abuse children are "parents of the victim." (Amicus Br. 5, fn. 3) Second, no one has ever suggested that a step-parent who in fact had inflicted abuse on a family member could have a claim for negligent investigation.

WASPC's argument that because *some* step-parents abuse step-children then *no* step-parent should be owed a duty of reasonable investigation would substitute "profiling" for investigation, contrary to this Court's decisions. See, e.g., **State v. Petrich**, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (excluding evidence that "because of defendants' particular relationship to the victim, he is statistically more likely to have committed child abuse"); **State v. Maule**, 35 Wn. App. 287, 293, 667 P.2d 96 (1983)

(reversible error to admit “expert” testimony that the majority of child sexual abuse cases involve ‘a male parent-figure, and of those cases . . . biological parents are in the majority”). The argument that a step-parent does not have standing to assert a claim for negligent investigation solely on the basis of a purported “Cinderella effect” maligns all those step-parents who have in fact assumed the parental responsibilities of financial and emotional support that our statutes and case law model as the paradigm for the step-parent relationship. See **Zellmer**, 164 Wn.2d at 505-06, ¶¶ 38-40.

Petitioner does not take the position that all step-parents will be owed a duty by the State – only those who can show they stand *in loco parentis*. A determination whether a step-parent is *in loco parentis* is a factual, and not a legal, inquiry, as this Court recognized in **Zellmer**, 164 Wn.2d at 166, 167, ¶¶ 39, 42, 44 (“The relevant focus is the stepparent’s overall relationship with the child, rather than the particular conduct upon which the child’s complaint is based.”). Here, the State’s acknowledgment of petitioner’s *in loco parentis* status in excluding him from the family home as a parent establishes that there are no issues of material fact. At a minimum, this Court should reverse and remand to the trial court to

resolve the factual issues of petitioner's *in loco parentis* status, and the reasonableness of the State's investigation prior to excluding him from the family home.

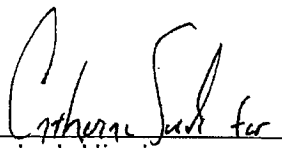
**C. Conclusion.**

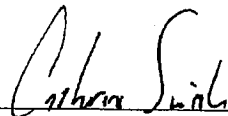
This Court should reject amicus' newly raised arguments and its invitation to substitute step-parent profiling for the State's duty to the family to reasonably investigate child abuse.

Dated this 15th day of May, 2009.

HIGGINSON LAW OFFICES

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By:   
Carla J. Higginson  
WSBA No. 10653

By:   
Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA 14355

Attorneys for Petitioner

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 MAY 15 A 11:19

**DECLARATION OF SERVICE**

BY RONALD R. CARPENTER, The undersigned declares under penalty of perjury, under  
the laws of the State of Washington, that the following is true and  
correct:  
CLERK

That on May 15, 2009, I arranged for service of the foregoing  
Petitioner's Answer to Amicus Brief of The Washington Association  
of Sheriffs And Police Chiefs, to the court and to counsel for the  
parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Catherine Hendricks Office of the Attorney General Torts Appellate Program 800 Fifth Avenue, Suite 2000 Seattle WA 98104-3188	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael P. Lynch Office of the Attorney General PO Box 40126 Olympia, WA 98504-0126	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail
Carla J. Higginson Higginson Law Offices 175 Second Street No. Friday Harbor WA 98250	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail
Stewart A. Estes Keating, Bucklin & McCormack 800 Fifth Ave., Suite 4141 Seattle WA 98104-3175	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail

DATED at Seattle, Washington this 15th day of May, 2009.

  
Tara D. Friesen

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL